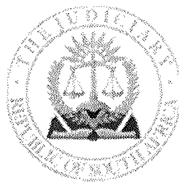
REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: Yes
(2) OF INTEREST TO OTHER JUDGES: Yes

25/10/19

DATE SIGNATURE

Case No.: 10467/14
15192/14

In the matter between:

Frajenron (Pty) Ltd **Plaintiff**

and

Metcash Trading Limited **First Defendant**

Metro Cash & Carry Limited **Second Defendant**

Incredible Happenings Trading CC **Third Defendant**

Paseka Frans Motsoeneng **Fourth Defendant**

JUDGMENT

Vally J

Introduction

[1] The plaintiff, Frajenron (Pty) Ltd, (Frajenron) sues the first and second defendants, Metcash Trading Limited (Metcash) and Metro Cash & Carry Limited (Metro) respectively for damages arising from a breach of contract. On 16 November 1993 a lease agreement (head lease) was concluded between

Frajenron and Metcash, wherein Frajenron leased an immovable property situated at Erven 710, 711, 712, 713, 714, 715 and 716, Junction Hill, Extension 7, Germiston, (the property) to Metcash. The head lease commencement date was on 1 December 1993, the date Metcash took occupation of the property, and the termination date was 1 December 2013, the date when Metcash was to return possession of the property to Frajenron.

[2] In a separate case, Metcash and Metro sued the third defendant, Incredible Happenings Trading CC (IH) and the fourth defendant, Mr Paseka Frans Motsoeneng (Mr Motsoeneng) for payment of arrear rental and other charges as well as for reimbursement of any damages the Court may award to Frajenron. Metcash's claim arises from a contract of lease concluded between itself and IH, with Mr Motsoeneng agreeing to stand surety for all of IH's indebtedness to Metcash. That agreement of lease (sub-lease) was concluded on 1 March 2012. It terminated on 30 November 2013. IH was given possession of the property in terms of the sub-lease. IH had, it is alleged, breached the sub-lease in or about April 2013 and on 17 July 2013 Metcash cancelled the agreement with it. Despite the cancellation IH remained in possession of the property. More importantly it was still in possession on and after 1 December 2013, when Metcash was obliged to return possession to Frajenron. IH's refusal to vacate the property on or before 1 December 2013 resulted in Metcash being unable to perform its obligation to return possession of the property to Frajenron on that date. Frajenron's claim arises from this breach by Metcash. Metcash's claim against IH is also based on a breach of contract. Given the integral

connection between the two cases it was deemed prudent to consolidate and hear them together.

[3] Metro had concluded a surety agreement with Frajenron in terms of which it stood surety for the full debt of Metcash. Relying on this agreement Frajenron asked that Metro be held jointly and severally liable for the damages it claims Metcash is accountable for. However, for most of the proceedings Metro was represented by the same firm of attorneys and counsel as Metcash. Its defence was the same as that of Metcash. Metro had been liquidated before the hearing of this matter commenced. A few days before the hearing the attorney for IH and Mr Motsoeneng delivered a Rule 7 notice on Metro's attorneys requesting proof that they had authority to represent Metro. In response the attorneys withdrew as attorneys of record for Metro and indicated that Metro had been liquidated by order of the court. The details of the liquidator were furnished. This development meant that Metro had to be substituted by the liquidator, and the notice of set down be served on him. However the notice was not served. Realising the problem this posed for the continuation of the hearing Frajenron moved for its claim against Metro to be postponed *sine die.* However, Frajenron had contacted the liquidator prior to moving for such an order and sought his approval. The approval was secured. The other defendants did not opposed the order sought. Accordingly, it was granted, and is recorded in the order that forms part of this judgment.

<u>The facts admitted by all parties</u>

[4] The facts upon which the two cases are based are to a very large extent agreed to by the parties. The only fact that was disputed was one raised in the case brought by Metcash against IH and Mr Motsoeneng. In terms of the head lease Metcash was not allowed to sub-let the property to any party without the consent of Frajenron. Metcash pleaded that such consent was received. IH and Mr Motsoeneng disputed this. It being a factual matter evidence was required. Metcash, bearing the *onus,* chose to present *viva voce* testimony to prove its contention. Save for this testimony no other evidence was presented by any party. All the other facts upon which the cases are to be determined were admitted as common cause.

[5] The sub-lease between Metcash and IH was concluded during March 2012. In April 2013 IH breached the sub-lease agreement by amongst others failing to pay Metcash the rental due to it. On 17 July 2013 Metcash cancelled the agreement. IH was required to vacate the property but failed to do so. In September 2013, some two months after it cancelled the sub-lease, Metcash launched legal proceedings to have IH evicted from the property. The application was brought in the ordinary course of an opposed application. In the meantime, Metcash continued paying Frajenron the rental due to it in terms of the head lease until 30 November 2013. On 1 December 2013 Frajenron demanded possession of the property from Metcash, but Metcash was unable to satisfy the demand as IH, who was its sub-tenant, refused to vacate the property. Metcash's application for the eviction of IH came before Moshidi J on 23 May 2014. Moshidi J decided to refer the application to trial. The trial was eventually set down for 30

October 2015, but due to normal delays on the trial roll it was due to commence a few days later, on 3 November 2015. On that day IH brought an application for postponement of the trial. The application was heard and granted by Francis J. Eleven months and one week after the head lease had terminated, on 7 November 2014, Frajenron launched an application for the eviction of IH from the property. It, too, was brought in the ordinary course of an opposed application. On 13 August 2015 Weiner J granted the order against IH. IH applied for leave to appeal against the order. Weiner J dismissed the application with costs on 23 November 2015. IH petitioned the President of the Supreme Court of Appeal (SCA) for leave to appeal against Weiner J's order. The petition was dismissed with costs. Frajenron finally acquired possession of the property on 1 April 2016.

Frajenron's claim against Metcash

[6] Frajenron's claim of damages against Metcash is for all the rental due to it from 1 December 2013 to 1 April 2016, plus interest on the rental amount, all costs it incurred in the course and scope of securing possession, and all payments made to third parties such as, *inter alia*, the municipality for water and electricity consumed by IH during its illegal occupation of the property. The amount of damages it claims are dealt with in greater detail below.

Metcash's defence

[7] Metcash has disputed some of the amounts claimed, but more importantly, raised the defence of impossibility of performance. It is necessary to examine this defence first before entertaining any of Metcash's challenge to parts

of the claims made by Frajenron. This is so because if Metcash's defence of impossibility of performance survives legal scrutiny and prevails then it would be unnecessary to consider the amounts claimed as damages by Frajenron.

[8] Metcash's defence is to be scrutinised on the basis of the facts set out in [1], [2] and [5] above. The defence is that Metcash did all that was legally possible to ensure that it complied with the head lease and return possession to Frajenron upon the termination of the said lease. However, it was stymied in its efforts by the unlawful conduct of IH, over which it had no control. It was, it claims, therefore impossible for it to perform. Accepting that it bore the onus to establish the impossibility it says that on the common cause facts the onus was discharged. Differently put, it seeks to be excused for its failure to perform on the basis that short of spoilating IH, which would be unlawful, it was impossible for it to perform its obligation. The contract therefore was voided from the moment it was thwarted by operation of the law to evict IH.

The SA law on impossibility of performance

[9] In 1919 our law on the issue of impossibility of performance was clarified by the then Appellate Division (AD) as recognising that impossibility of performance is a legally permissible basis for discharging a party from performing its contractual obligation. However, long before the AD was afforded the opportunity to confront the issue it surfaced in the English courts in 1863. The case that brought it to the fore is that of *Caldwell*.[1] In that case the plaintiffs

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[1] *Taylor & Anor v Caldwell & Anor* [1863] EWHC QB J1 (6 May 1863) Can be accessed at http://www.bailii.org/ew/cases/EWHC/QB/1863/J1.html

agreed to hire a music hall ("The Surrey Gardens and Music Hall") from the defendants for four days to present a show. Post the conclusion of the contract, but before the defendant was obliged to provide the hall, it was destroyed in a fire causing the defendant to breach the contract by failing to provide the hall on the days the show was to be held. In the meantime the plaintiffs had expended financial and other resources towards advertising and preparing for the show. Claiming these to be the damages they suffered by virtue of the plaintiffs failing to provide the hall as per the terms of the contract, they sued for their recovery. The court, per Blackburn J, examined the evolving jurisprudence of the time and concluded:

> "The principle seems to us to be that, in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance. In none of these cases is the promise in words other than positive, nor is there any express stipulation that the destruction of the person or thing shall excuse the performance; but that excuse is by law implied, because from the nature of the contract it is apparent that the parties contracted on the basis of the continued existence of the particular person or chattel. In the present case, looking at the whole contract, we find that the parties contracted on the basis of the continued existence of the Music Hall at the time when the concerts were to be given; that being essential to their performance.
>
> We think, therefore, that the Music Hall having ceased to exist, without fault of either party, both parties are excused, the plaintiffs from taking the gardens and paying the money, the defendants from performing their promise to give the use of the Hall and Gardens and other things. Consequently the rule must be absolute to enter the verdict for the defendants."[2]

[10] The AD in *Peters, Flamman & Co.* noted the learning in *Caldwell*, considered the development of our common law in this area and observed:

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[2] Id.

> "By the Civil law a contract is void if at the time of its inception its performance is impossible. ... So also where a contract has become impossible of performance after it had been entered into the general rule was that the position is then the same as if it had been impossible from the beginning. ... For the authorities are clear that if a person is prevented from performing his contract by *vis major* or *casus fortuitous*, under which would be included such as an Act of State as we are concerned with in this appeal, he is discharged from liability."[3]

[11] The *dictum* in Caldwell gave rise to the doctrine of frustration in English law. The doctrine has been explained in *Davis Contractors* by Lord Reid to mean:

> " ... the termination of the contract by operation of law on the emergence of a fundamentally different situation."[4]

In the same case, Lord Radlciffe explains it as follows:

> ".... frustration occurs whenever the law recognises that, without default of either party, a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. *Non haec in foedera veni.* It was not this that I promised to do."[5]

[12] After surveying the case law for purposes of extrapolating the evolving principles underlying the doctrine Lord Bingham LJ (as he then was) with commendable clarity summarises them in these terms:

> "1.The doctrine of frustration was evolved to mitigate the rigour of the common law's insistence on literal performance of absolute promises. The object of the doctrine was to give effect to the demands of justice, to achieve a just and reasonable result, to do what is reasonable and fair, as an expedient to escape from injustice where such would result from enforcement of a contract in its literal terms after a significant change in circumstances.
>
> 2. Since the effect of frustration is to kill the contract and discharge the parties from further liability under it, the doctrine is not to be lightly invoked, must be kept within very narrow limits and ought not to be extended.

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[3] *Peters, Flamman & Co v Kokstad Municipality* 1919 AD 427 at 434-5
[4] *Davis Contractors v Fareham Urban District Council* 1956 2 All ER 145 (HL) at 155E
[5] Id. at 160D-E

> 3. Frustration brings the contract to an end forthwith, without more and automatically.
>
> 4. The essence of frustration is that it should not be due to the act or election of the party seeking to rely on it. A frustrating event must be some outside event or extraneous change of situation.
>
> 5. A frustrating event must take place without blame or fault on the side of the party seeking to rely on it."[6]

[13] Our law on the impossibility of performance evolved on a similar footing. As noted above, it commenced with the *dictum* (quoted in [10] above) in *Peters, Flamman & Co*. By that *dictum* the two factors or circumstances that would excuse the non-performance are *vis major* and *casus fortuitous*. As the law evolved it was clarified that not every *vis major* or *casus fortuitous* will excuse the non-performance. Facts specific to a case will determine whether the non-performance should be excused. These would include the nature, terms and context of the contract, the nature of the parties, their relationship and the nature of the impossibility relied upon.[7] No party is allowed to rely on an impossibility caused by its own act or omission[8] – there should be no fault or neglect on its part in the creation of the impossibility. The impossibility must be absolute and not relative[9] and it must be applicable to everyone and not personal to the defendant, i.e. it must be objective.[10]

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[6] *J Lauritzen A S v Wijsmuller B V, (The Super Servant Two)* [1990] 1 Llyod's Law Reports 1 at 8 (citations contained therein have been omitted).
[7] *Herman v Shapiro & Co* 1926 TPD 367 at 373;*Transnet Ltd v Owner of MV Snow Crystal* 2008 (4) SA 111 (SCA) at [28]
[8] *King Sebata Dalinyebo Municipality v Landmark Mthatha (Pty) Ltd* [2013] 3 All SA 251 (SCA) at [28]; *South African Forestry Co Ltd v York Timbers Ltd* 2005 (3) SA 323 at [23]; *Owner of MV Snow Crystal*, Id.
[9] *Unibank Savings and Loans (formerly Community Bank v Absa Bank* 2000 (4) SA 191 (W) at [9.2]
[10] Id.

[14] In terms of this rule an obligation to perform is discharged by a subsequent change of circumstances that were neither foreseeable nor foreseen. The reasoning underlying the doctrine is that the need or demand for justice requires that the law excuses non-performance because not to do so would effectively be punishing a party that wants to, but cannot, perform its obligations through no fault or neglect of its own, and in conditions whereupon by exercising reasonable and prudent care *ab initio* it could never have foreseen that circumstances preventing it from performing would come to prevail. It is a valuable rule. It demonstrates that the law is alive to the fact that not every future fact, circumstance or eventuality is foreseeable even by the most prudent and cautious of persons (the officious bystander). Importantly though, the future fact, circumstance or eventuality must not result from the default or neglect of the party failing to perform as per the terms of the contract. After all, the law is unquestionable that no person should be allowed to benefit from his own wrongful act or omission.

[15] In my judgment, there is clearly significant commonality between our law of impossibility of performance and the English law of frustration. In fact, the summary of the doctrine as outlined by Lord Bingham LJ (see [12] above) and the substance of our law as captured in [13] above demonstrate hardly any difference between the two. Nevertheless, there has been a strongly held view that our law is narrower in scope than English law. The court in *Bayley* came to the conclusion that "*it is clear from the judgment in Peters, Flamman & Co. that the English law doctrine of frustration does not form part of our law. Under our law a person can only escape liability when he can prove that a contract has*

been discharged by impossibility of performance."[11] The *dictum* appears to be the basis for the learned author GB Bradfield's averment that "*it is clear that there is no room in our law for the English doctrine of frustration.*"[12] The underlying concern for not adopting the English doctrine of frustration is that it leaves too much room for a party to escape its obligations without facing any consequences. Put differently, it places the *pacta sunt servanda* principle in jeopardy. However, we cannot avoid the conclusion that even on the approach adopted in *Peters, Flamman & Co.* the *pacta sunt servanda* principle is subject to a party not encountering an unforeseen (and unforeseeable) event that made performance impossible. To that end the *pacta sunt servanda* principle is not absolute. In any event, the *pacta sunt servanda* principle has been refined in our law since the enactment of the *Constitution of the Republic of South Africa Act 108 of 1996.* There is no need to canvass the developments leading to its refinement.[13] Furthermore, it is important to bear in mind that the English doctrine does not dispense with the *pacta sunt servanda* principle nor does it tamper with it any more than is necessary to achieve justice.

[16] On a holistic comparison of the two approaches it would, in my view, be appropriate to conclude that they are not very different. Like the South African law the English doctrine does not allow a party to easily avoid the consequences of its non-performance by alleging frustration. As can be seen by the summary provided by Lord Bingham LJ the law is carefully calibrated to ensure that the

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[11] *Bayley v Harwood* 1953 (3) SA 239 (T) at 244C-D

[12] GB Bradfield, *Christie's Law of Contract 7th Ed.* fn 430 at 547. Prof Bradfield had valiantly accepted the not so easy task of updating the famous encyclopedic work – *The Law of Contract* by the late RH Christie and has admirably accomplished the task.

[13] See my minority judgment in *Atlantis Property Holdings CC v Atlantis Excel Service Station* [2019] 3 All SA 441 (GJ) for my views on this development

doctrine cannot be invoked at whim by a party trying to escape liability. The authorities in England make it explicit, "*the doctrine is not to be lightly invoked, must be kept within very narrow limits and ought not to be extended*".[14] In other words, "(f)*rustration is not to be lightly invoked as the dissolvent of a contract.*"[15]

[17] Finally, the authorities show that the events, *vis major* and *casus fortuitous*, are not confined to acts of nature only. They encapsulate any event that may be caused by human agency as long as it was "*unforeseeable with reasonable foresight and unavoidable with reasonable care.*" [16]

Is Metcash discharged of its obligations by virtue of the conduct of IH?

[18] The head lease was to terminate by effluxion of time on 30 November 2013. Metcash could not extract economic value from the property from sometime in 2012, and in March 2012 introduced IH to the fold. IH's conduct, it is agreed, is the cause of Frajenron being denied repossession of its property upon the termination of the head lease. On these facts, in my judgment, Metcash must bear the consequences of IH's conduct. It was the risk bearer, not Frajenron. It sought to protect itself from the hazard of not being able to extract economic value from the property while at the same time having to pay for it each month until 30 November 2013. To cover its liability it sought out a tenant to sub-let to. It found one. It did so to reduce its exposure to loss caused by its own inability to take economic advantage of the use of the property. Instead of leaving the property unoccupied and paying the amounts due for rental and other

[14] Per Lord Bingham LJ see the quote in [12] above
[15] *Davis Construction*, n 4, at 159G
[16] GB Bradfield n 12, at 549.

services (as prescribed in the head lease), or returning it immediately to Frajenron as it no longer could extract economic value from the property, it decided to sub-let it to IH. Had it done the former its liability would have been limited. At the same time it would have had the option to return the property and call upon Frajenron to do whatever it could to mitigate its loss. Should Frajenron have succeeded in mitigating all or part of its loss Metcash would only have been liable for whatever loss, if any, that Frajenron suffered. On this analysis, both Metcash's and Frajenron's loss was limited to total rental amount due until 30 November 2013 as well as costs for services incurred up to and including that date. Instead of living with this loss, Metcash on its own volition brought IH into the arena and thereby exposed Frajenron and itself to far greater loss than they both were otherwise exposed to.

[19] The increase in the loss was foreseeable by any reasonable person in the position of Metcash exercising prudence and due care. The duty to foresee the possibility of IH's unlawful conduct rested exclusively with Metcash, and had it exercised due diligence it ought to have foreseen the possibility before it decided to accept IH as a sub-lessee. Frajenron had no role in this. It had no dealings with IH. It was merely asked to provide its consent to Metcash to sub-let the property to IH. Had it refused to provide its consent it would be at risk of acting unreasonably and in breach of its duty to Metcash. That was the limit of its duty. It had no duty to scrutinise the credibility of IH. It contracted with Metcash. Acting reasonably it could only foresee the possibility of Metcash refusing to vacate the property upon the termination of the lease. As it had no dealings with IH it could

not and was not expected to foresee the possibility of IH refusing to vacate the property upon the termination of the lease.

[20] Had Metcash not sought out a sub-lessee or had it refused to sub-let to IH, it would not have been in the position it found itself in on 1 December 2013 when it could not return the property to Frajenron. Thus, when it found itself in the unenviable position of having to breach its obligations to Frajenron, it was because it led itself into that position. Differently conceived, the impossibility of performance (or frustration, if we are to examine it through the lens of English doctrine) Metcash claims to have experienced was self-induced. Both our rule on impossibility of performance and the English doctrine of frustration do not afford Metcash any protection in these circumstances for it is its own initial conduct (sub-letting) that was the cause of the event which prevented (our law) or frustrated (English law) it from returning possession of the property to Frajenron. Thus approached on either basis the conclusion is the same.

[21] On this reasoning, the fact that Metcash took legal steps to evict IH, and was stymied by the legal process to secure the eviction on or before 30 November 2013, is of no moment. The fact that the operation of the legal process sometimes fails to move with the speed that meets the interest of a party does not constitute impossibility of performance. The unlawful actions of IH and the nature of the legal process involved in securing appropriate relief to terminate the unlawfulness was, or ought to have been, within the contemplation of Metcash when it contracted with IH.[17] In other words, it was foreseeable by

[17] See: *Nuclear Fuels Corporation of SA (Pty) Ltd v Orda AG*1190 (A) at 1206E-1207F

Metcash, as it would have been to any reasonable person in its position, and it could have been avoided.

[22] For these reasons, I conclude that the impossibility of performance rule does not rescue Metcash from the consequences of its breach. Both reason and justice direct only to that conclusion.

The damages claimed by Frajenron

[23] The damages that Frajenron is entitled to are:

> " ... (*a*) those damages that flow naturally and generally from the kind of breach of contract in question and which the law presumes the parties contemplated as a probable result of the breach, and (*b*) those damages that, although caused by the breach of contract, are ordinarily regarded in law as being too remote to be recoverable unless, in the special circumstances attending the conclusion of the contract, the parties actually or presumptively contemplated that they would probably result from its breach. The two limbs, (*a*) and (*b*), of the abovestated limitation upon the defaulting party's liability for damages correspond closely to the well-known two rules in the English case of *Hadley* v. *Baxendale*, 156 E.R. 145, which read as follows (at p 151):
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>> "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it."
>
> As was pointed out in the *Victoria Falls* case, *supra*, the laws of Holland and England are in substantial agreement on this point. The damages described in limb (*a*) and the first rule in *Hadley* v. *Baxendale* are often labelled "general" or "intrinsic" damages, while those described in limb (*b*) and the second rule in *Hadley* v. *Baxendale* are called "special" or "extrinsic" damages"[18]

[18] *Holmdene Brickworks (Pty) Ltd V Roberts Construction Ltd* 1977 (3) SA 670 (A) at 687B-H

[24] Frajenron claims:

[24.1] the rental due to it from 1 December 2013 to 15 April 2016. This is the damages suffered in the form of loss of rental while IH had possession of the property. The total amount it claims under this head is R7 479 262.49. There is no dispute on this between the parties as to this amount.

[24.2] Interest in the amount of R884 901.23. This is for the non-payment from 1 December 2013 to 15 April 2016 (when it regained possession of the property). It is calculated using Nedbank's prime overdraft rate for the period 1 December 2013 to 15 April 2016 and is compounded monthly. Metcash contends that Frajenron is not entitled to this amount as its claim is one for damages. According to Metcash, Frajenron is only entitled to *mora* interest to be calculated from the date of summons, which is 20 March 2014. I agree with the submission of Metcash. Frajenron is only entitled to *mora* interest once it has proven the damages it suffered.

[24.3] Legal costs in the amount of R167 171. 47 incurred by it to regain possession of the property from IH. This amount is claimed on the basis that it was the necessary costs it incurred in order to regain the property. It had to incur these costs in order to mitigate its loss. That Frajenron expended this amount is not disputed and that it resulted in the mitigation of Frajenron's loss is also not disputed. Accordingly, I hold it is entitled to this amount.

[24.4] The amount of R208 552. 91 being the amount it expended to repair the property after regaining possession. The repairs were necessary to restore the condition of the property to the same state it was in when the head lease commenced. Neither the amount nor the fact that it was expended towards necessary repairs to restore the property to its original state are disputed. The damage flows naturally and directly from the breach of Metcash. It is, therefore, entitled to this amount.

[24.5] The amount of R1 391 309.64 being an amount of R1 250 300. 56 for rates, taxes, municipal charges, water and electricity consumption charges (municipal charges) paid to the Municipality, plus an amount of R309 196.73 paid to a third party, New Ventures, in order to resolve a dispute with the Municipality regarding the quantum of the municipal charges levied by the Municipality. Metcash contends that Frajenron is not entitled to the amount of R309 196.73 as the expenditure is too remote from the its breach. Frajenron points out that it was necessary for it to engage New Ventures and thereby incur this expenditure in order to reduce the amount charged by the Municipality. Unfortunately, Frajenron has not put up any evidence to show that the payment to New Ventures actually resulted in a reduction of the charges levied by the Municipality. It is, therefore, not possible to conclude that this expenditure was naturally and generally a result of the breach by Metcash. Frajenron is therefore not entitled to it.

[25] In my view then Metcash is liable to Frajenron for: R7 479 262.49 + R167 171. 47 + R208 552 + R1 250 300. 56, which totals R9 105 286.52

[26] That concludes the case between Frajenron and Metcash, save for the issue of costs, which is dealt with later.

Metcash's claims against IH and Mr Motsoeneng

[27] Metcash's claims against IH arise from its breach of the sub-lease agreement and from its unlawful activities which caused it to be liable to Frajenron for damages Frajenron suffered. Its claim against Mr Motsoeneng is based on a surety signed by Mr Motsoeneng whereby he accepted liability for all debts, howsoever arising, incurred by IH. Mr Motsoeneng did not raise any issue with regard to the validity or applicability of the surety agreement.

[28] IH and Mr Motsoeneng made common cause in their resistance to the claims. Prior to the commencement of the hearing they withdrew their plea on the merits and replaced it with a "*special plea*", in which they contended that firstly, the particulars of claim of Metcash and Metro did not disclose any cause of action and, secondly, they (Metcash and Metro) did not receive the necessary consent from Frajenron to sub-lease the property.

[29] At the hearing they withdrew the first part of their plea but persisted with the second part. To meet the challenge posed by the second part of the plea Metcash led the evidence of one witness only, a Mr Mathinus Frylinck Crafford (Mr Crafford), who at the stage the sub-lease agreement was concluded was the

property and legal director of Metcash. His duties included, amongst others, the conclusion of lease agreements on behalf of Metcash. He confirmed that Frajenron gave Metcash and Metro the necessary consent to sub-let the property to IH. His evidence was short and crisp. He was cross-examined. At the conclusion of the cross-examination, his evidence that the necessary consent was received remained untainted.

[30] IH and Mr Motsoeneng were offered the opportunity to lead any evidence in support of their plea. They elected not to take advantage of the opportunity.

[31] In the light of the evidence of Mr Crafford the finding that Metcash and Metro had acquired the necessary consent from Frajenron to conclude the sub-lease is ineluctable. IH and Mr Motsoeneng were not able to produce any factual evidence to contradict that of Mr Crafford. It is also important to remember that between Frajenron and Metcash it was common cause that Frajenron had consented to Metcash sub-leasing the property. Accordingly, the claim of IH and Mr Motsoeneng is rejected.

[32] Since IH and Mr Motsoeneng elected not to challenge the substance of the claims against them by Metcash, it has to be accepted that they have no defence thereto. That much, in any event, was acknowledged by their attorney during the hearing.

[33] Metcash claims the sum of R2 537 768.26 for arrear rental and other charges for the period up to and including 17 July 2013 (the period during the

currency of the sub-lease). It claims the amount of R774 812. 25 (for the period IH held-over the property whilst the head lease was still in existence). Furthermore, they seek to recover from IH and Mr Motsoeneng all the damages suffered by Frajenron for which they have been made liable. They contended that their liability to Frajenron arises solely from the unlawful conduct of IH. As mentioned, their contention went unchallenged. Hence, IH and Mr Motsoeneng are to be held accountable for these liabilities of Metcash.

[34] In conclusion, as IH and Mr Motsoeneng chose not to meet the case of Metcash on the merits as well as the quantum, they are liable for all the claims brought against them by it. These claims in total are R3 312 580. 51 (i.e. R2 537 768. 26 + R774 812. 25) plus all the damages Frajenron successfully proves against Metcash.

Costs

[35] There was agreement that costs should follow the result, save for the costs of attendance at the judicial case management meetings of 20 November 2018, 3 December 2018, 10 December 2018, 17 January 2019 and 20 February 2019, which according to Frajenron should be borne by IH and Mr Motsoeneng as they were the cause of these meetings not achieving their objectives. They, for lack of preparation were not able to participate fully in the meetings, which resulted in the meetings not taking decisions on important matters. In consequence the issues that could have been resolved at those meetings were not fully attended to. Metcash is, in its words, "*agnostic*" on this issue. IH and Mr Motsoeneng gave no sound explanation for their lack of preparation. I agree with

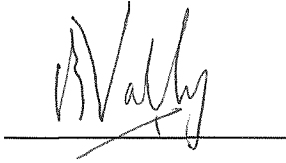
Frajenron that all costs arising from attendance to those meetings should be borne by IH and Mr Motsoeneng.

Order

[36] The following order is made:

1. The claim between the plaintiff and second defendant is postponed *sine die*.
2. The first defendant is to pay the plaintiff the sum of R9 105 286.52.
3. The first defendant is to pay interest *a temporae mora* on the aforesaid amount to be calculated from 20 March 2014 to date of payment.
4. The first defendant is to pay the plaintiff's costs which are to exclude the costs of attendance at the judicial case management meetings on 20 November 2018, 3 December 2018, 10 December 2018, 17 January 2019 and 20 February 2019.
5. The third defendant and fourth defendant are to jointly and severally pay the plaintiff's costs of attendance at the judicial case management meetings of 20 November 2018, 3 December 2018, 10 December 2018, 17 January 2019 and 20 February 2019.
6. The third and fourth defendant are to jointly and severally pay the first defendant the sum of
    (i) R3 312 580. 51 together with interest *a temporae mora* to be calculated from date of this judgment to date of payment.
    (ii) R9 105 286.52 together with interest *a temporae mora* to be calculated from date of this judgment to date of payment.

7. The third and fourth defendants are to jointly and severally pay the costs of the first defendant including the costs of attendance at all judicial case management meetings.



Vally J

Dates of hearing:	26, 27, 28, 29 August, 2, 4 September 2019
Date of judgment:	25 October 2019
For the Plaintiff:	Adv PM Cirone
Instructed by:	Werksmans Attorneys
For the First Defendant:	Adv HA van der Merwe
Instructed by:	Fluxmans Inc.
For the Third and Fourth Defendants:	Mr MW Mukhawana of MW Mukhawana Attorneys